International Brotherhood of Electrical Workers, Local 340 *and* Harold E. Nutter, Inc. *and* Royal Electric Company. Cases 20-CB-5717, 20-CB-5781, and 20-CB-5825

14 August 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND DENNIS

On 27 September 1983 Administrative Law Judge Jay R. Pollack issued the attached decision. The General Counsel, the Respondent, and the Charging Parties filed exceptions and supporting briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[1] findings,[2] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, International Brotherhood of Electrical Workers, Local 340, Sacramento, California, its officers, agents, and representatives, shall take the action set forth in the Order.

[1] The complaints allege and the parties stipulate that Harold E. Nutter, Inc. and Royal Electric Company are California companies engaged in electrical contracting and that in the normal course and conduct of their business each annually purchases, either directly or indirectly, materials and supplies valued in excess of $50,000 from suppliers located outside the State of California. Accordingly, Harold E. Nutter, Inc. and Royal Electric Company are employers engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge. I heard these consolidated cases in trial on July 28, 1983, at Sacramento, California. The cases arose as follows: Harold E. Nutter, Inc. (Nutter Electric) filed a charge in Case 20-CB-5717 on November 22, 1982, against International Brotherhood of Electrical Workers, Local 340 (Respondent or the Union). On December 22, 1982, the Regional Director for Region 20 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing against Respondent. The charge in Case 20-CB-5781 was filed against Respondent by Royal Electric Company (Royal Electric) on February 8, 1983. On March 11, the Regional Director issued a complaint and notice of hearing against Respondent in Case 20-CB-5781 and an order consolidating that case with Case 20-CB-5717 for purpose of hearing. Thereafter, Nutter Electric filed the charge in Case 20-CB-5825. On May 11, the Regional Director issued a complaint in Case 20-CB-5825 and an order consolidating that case for trial with the two prior cases.

The issues

The principal questions presented for decision were:

1. Whether Albert L. Schoux (Royal Electric) and Melvin K. Miller (Nutter Electric) were supervisors within the meaning of Section 2(11) of the Act and whether Schoux, Miller, and James K. "Ted" Choate (Nutter Electric)[1] were representatives of their employers for the purposes of collective bargaining or the adjustment of grievances within the meaning of Section 8(b)(1)(B) of the Act.

2. Whether Respondent violated Section 8(b)(1)(B) of the Act by fining Choate, Schoux, and Miller for working for their respective employers.

All parties were given full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Based on the entire record, and from my observation of the demeanor of the witnesses and after due consideration of the briefs filed on behalf of the parties, I make the following

FINDINGS OF FACT AND CONCLUSIONS

I. JURISDICTION

Royal Electric and Nutter Electric are electrical contractors doing business in the Sacramento, California area. The parties stipulated that Royal Electric meets the Board's standard for asserting jurisdiction based on the direct and indirect inflow standards.[2] The parties further stipulated that Nutter Electric meets the Board's indirect inflow standard for asserting jurisdiction. Accordingly, I find Royal Electric and Nutter Electric to be employers engaged in commerce and in businesses affecting commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, the answer admits, and I find that Respondent has been, at all times material, a labor organization within the meaning of Section 2(5) of the Act.

[1] The parties stipulated that Choate was a supervisor within the meaning of Sec. 2(11) of the Act for Nutter Electric.

[2] See generally *Siemons Mailing Service*, 122 NLRB 81 (1958).

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

National Electrical Contractors Association, Inc., Sacramento Valley Chapter (NECA) is an association of employers engaged in electrical contracting which has as one of its purposes the representation of its employer-members in negotiating and administering collective-bargaining agreements with various labor organizations. Respondent and NECA had a collective-bargaining relationship for approximately 40 years. The last collective-bargaining agreement between Respondent and NECA expired May 31, 1981. On June 11, 1981, Respondent commenced a strike against the employers in the NECA multi-employer bargaining group, including Nutter Electric and Royal Electric.[3] On September 15 the Union sent NECA a disclaimer of interest which provided:

> On behalf of Local Union 340, IBEW, this letter shall serve as, and constitute a disclaimer of interest by IBEW Local Union 340 in representing, for purposes of collective bargaining or any other purpose, the employees of the multi-bargaining unit previously established and consisting of the employees of the employer-members of the Sacramento Valley Chapter, of the National Electrical Contractors Association, Inc., and other employers who have, from time to time, agreed to become part of the multi-employer bargaining unit. This disclaimer covers the employees covered by the Inside Wireman's Agreement, the Line Agreement, and the Material Handler's Agreement, and is intended to disclaim interest as to the multi-employer bargaining units or unit previously created by these three separate labor contracts.

On September 25, the Union filed 17 representation petitions in individual employer units for 17 employers, formerly in the NECA bargaining unit. No petition was filed for representation of the employees of either Nutter Electric or Royal Electric. The Regional Director administratively dismissed the 17 petitions on the basis that the appropriate bargaining unit was the multi-employer unit. On October 1 NECA signed a collective-bargaining agreement with the National Association of Independent Unions (NAIU), which agreement purported to cover the electrician employees of the employers previously involved in the negotiations between NECA and Respondent. Both Nutter Electric and Royal Electric adopted the NECA-NAIU agreement. On August 12, 1982, the Board directed a hearing on the issue of the continued existence or viability of the multiemployer unit. The Board order is reported as *Arden Electric*, 263 NLRB 318 (1982). The hearing in the representation cases closed on February 28, 1983, and the decision in that case is now pending before the Board.

On March 28, 1983, I issued a decision in *Electrical Workers IBEW Local 340 (Hulse Electric)*, JD-(SF)-55-83, in which I found, inter alia, that Respondent violated Section 8(b)(1)(B) of the Act by preferring charges against representatives of May Han Electric, d/b/a M & M Electric; Clint McCubbin, Inc.; Rex Moore Electric Company; and Amos J. Walker, Inc., and by imposing fines against such representatives. That case is now pending before the Board on exceptions to my decision. On August 31, 1983, I issued my decision in *Grason Electric*, JD-(SF)-190-83, in which I found, inter alia, that Nutter Electric unlawfully assisted the NAIU by unlawfully soliciting its employees to sign dues-checkoff authorizations and by unlawfully deducting dues from the wages of employees prior to proper written authorization. In that case I dismissed, inter alia, an allegation that Nutter Electric had unlawfully recognized the NAIU as the exclusive bargaining representative of its employees. The Union was the charging party in the *Grason Electric* case. That case is pending before the Board as the time for filing exceptions to the decision has not yet expired.

The instant cases arise out of intraunion fines by Respondent against Melvin Miller and Ted Choate for working for Nutter Electric and Albert Schoux for working for Royal Electric. The General Counsel alleges that the fines of Miller, Choate, and Schoux violated Section 8(b)(1)(B) on the theory that all were natural and potential representatives of their employers for the purpose of collective bargaining and the adjustment of grievances. Respondent contends that the alleged supervisors did not possess the authority to bargain collectively or to adjust grievances and further that no violation could be found because the Union had previously disclaimed interest in representing the employees in the NECA multiemployer bargaining unit.

B. *Albert Schoux, Superintendent for Royal Electric*

1. Supervisory status

Albert Schoux has been employed as a superintendent by Royal Electric for approximately 2 years. In July or August 1982, Schoux was made superintendent on a job for Royal Electric known as the Aerojet job. Schoux was completely in charge of the job. Thus, Schoux did all the hiring, firing, planning, and ordering for the job. Leo Velluntini, one of the owners of Royal Electric, placed Schoux in charge of the project and thereafter visited the project only for a final inspection. Schoux assigned employees to their job assignments and transferred employees to different projects on the jobsite. Schoux has recommended that employees be promoted to formen and his recommendations have been followed. Foremen report to Schoux and have their manpower needs filled by Schoux. If Schoux needs more workers, he calls Royal Electric's office to see if workmen are available from other jobsites. If workmen are not available from other sites, Schoux is authorized to call NECA's hiring hall for additional employees. If the workload decreases, Schoux calls the office to see if em-

[3] At the time the strike commenced, there were approximately 55 employers in the NECA bargaining unit. Although Respondent argues that Royal Electric was not part of the multiemployer bargaining group, the uncontradicted evidence shows that all parties, NECA, Respondent, and Royal Electric, treated Royal Electric as part of the group from March 1981 until at least September 1981 when Respondent disclaimed interest in the NECA bargaining group.

ployees can be sent to other jobsites of the Company. If there is no work at other sites, Schoux lays off the unneeded employees. It is Schoux who decides how many employees are needed, which employees to keep, and which employees to lay off.

Schoux works with the tools of the trade only 4 or 5 hours a week. Schoux uses the tools in order to inspect work done by the employees under his supervision. He is paid 50 percent more than the rate paid Royal Electric's journeymen electricians. Although there is no evidence that Schoux adjusts grievances under the collective-bargaining agreement, he does handle employees' personal problems on the job. Schoux has granted employees time off for personal reasons and on two occasions changed job assignments pursuant to requests from employees. One employee, not wanting to work at elevated heights, asked to be reassigned to a job station on a lower level of the building. Schoux had the employee switch assignments with another employee. On another occasion, an employee told Schoux that he was unable to perform an assigned task and Schoux reassigned the employee to another job more in line with the employee's experience level.

Based on the foregoing facts, I find that Albert Schoux has been at all times material herein a supervisor of Royal Electric within the meaning of Section 2(11) of the Act. Respondent contends that Schoux has not engaged in collective bargaining or the adjustment of grievances and, therefore, is not protected by Section 8(b)(1)(B) of the Act. However, under the Board's "reservoir doctrine," the Board interprets the term "representative for the purposes of collective bargaining or the adjustment of grievances" broadly so as to include all individuals who are supervisors within the meaning of Section 2(11) on the ground that such individuals form the logical "reservoir" from which the employer is likely to select his representatives for collective bargaining or grievance adjustment. See, e.g., *Toledo Lithographers Locals 15-P and 272 (The Toledo Blade Co.)*, 175 NLRB 1072 (1969), enfd. 437 F.2d 55 (6th Cir. 1971). Recently, in *Teamsters Local 296 (Northwest Publications*, 263 NLRB 778, 779 fn. 6 (1982), the Board reaffirmed its adherence to the "reservoir doctrine" and its position that all supervisors within the meaning of Section 2(11) are representatives within the intent of Section 8(b)(1)(B).

Even without resort to the "reservoir doctrine," the evidence establishes that Schoux adjusted grievances as the Board defines that term. The evidence establishes that Schoux granted employees time off and resolved personal complaints or problems regarding job assignments. The Board has broadly interpreted the term grievances as used in both Section 2(11) and Section 8(b)(1)(B) so as to include not only contractual grievances but also personal grievances. *Typographical Union No. 529 (Hour Publishing Co.)*, 241 NLRB 310, 315 (1979); *Toledo Blade Co.*, supra.

2. The union discipline

Schoux is a member of IBEW Local 595, a sister local of Respondent, in Oakland, California. On December 20, 1982, Charles Lux, a member of Respondent, filed intraunion charges against Schoux for working on Royal Electric's Aerojet jobsite on December 14. Lux testified in this proceeding that he saw Schoux working with the tools for 2 or 3 days on the Aerojet jobsite.[4] However, Lux further testified that he saw Schoux working for 15–20 minutes mounting a disc connection on a concrete pillar and based on that he inferred that Schoux was working for 2 or 3 days. Further, Lux testified that Schoux was wearing a tool pouch when, in fact, Schoux never wears a tool pouch because of a back injury. Schoux testified that he did not install any disc connections or perform any electrical work on the Aerojet job. According to Schoux, he was inspecting the switch gear on a high voltage transformer pad when he was approached by Lux on the jobsite. In my opinion, Lux testified as to his subjective impressions and did not testify in an objective manner. I find Schoux's testimony to be more reliable and, accordingly, I credit Schoux's testimony over that of Lux.[5]

On February 7, 1983, the Union's trial board found Schoux guilty of the charges brought against him by Lux. The trial board fined Schoux a total of $8200. On February 22, the IBEW, International (Respondent's parent organization) notified Schoux's home local, Local 595, of the discipline taken against Schoux by Respondent. Schoux did not appear at the trial board meeting and has not paid the fine levied against him. Although Schoux did not appear at the trial board meeting, he wrote the Union a letter prior to the trial board in which he notified the Union that he was a supervisor and that Royal Electric had filed the instant charge with the Board alleging that Respondent's conduct violated Section 8(b)(1)(B) of the Act. Apparently, the Union gave no consideration to Schoux's letter.

C. *Melvin Miller, Foreman for Nutter Electric*

3. Supervisory status

Melvin Miller has been employed by Nutter Electric for approximately 9 years. When Respondent went on strike in June 1981, Miller was working as a foreman on a job for Nutter Electric in Redding, California. The job in Redding was under the jurisdiction of IBEW Local 442, a sister local of Respondent. As the Redding job was unaffected by Respondent's strike, Miller worked for Nutter Electric until the completion of the job in the fall of 1981. Miller came back to work for Nutter Electric in late January 1982, after the Union had issued its disclaim-

[4] Lux was employed by another electrical subcontractor when he observed Schoux on the job.

[5] The fact that Schoux worked 4 or 5 hours a week with the tools of the trade does not detract from his supervisory status. See, e.g., *E.E.E. Co.*, 171 NLRB 982 (1968); *Penco Enterprises*, 201 NLRB 29, 31 (1973).

In cases involving discipline of supervisors for crossing a picket line, the Board inquires into whether the supervisors performed more than minimal amounts of rank-and-file work. See, e.g., *Typographical Union 101 (Washington Post)*, 242 NLRB 1079 (1979). However, in cases involving discipline for working for a nonunion employer, in a nonpicket line situation, the Board apparently does not inquire into the amount of rank-and-file work performed. See, e.g., *Painters District Council No. 36 Brown & Co.*, 259 NLRB 808 (1981). In any event, the record does not show that Schoux performed more than a minimal amount of rank-and-file work. Further, it does not appear that Respondent was concerned with Schoux's actual duties for Royal Electric.

er and after Nutter Electric had adopted the NECA-NAIU bargaining agreement.

Miller commenced work in January 1982 as the foreman for Nutter Electric at its electrical subcontract for the new construction of a Mervyn's department store. The Mervyn's jobsite had no proof and was shut down many days in early 1982 due to weather conditions. When weather did not permit work at the Mervyn's jobsite, Miller filled in at another project for Nutter Electric known as the United Grocers' jobsite. At the United Grocers' jobsite, Miller continued to recieve foreman's pay. However, on the United Grocers' jobsite, Miller worked as a journeyman electrician. According to Norman Nutter, Nutter Electric's president, Miller set the standard for the NAIU personnel and reported directly to Nutter Electric's management on the abilities of the foremen on the United Grocers' job. However, Miller had no supervisory authority while working on the United Grocers' job. Norman Nutter testified that because he wanted to avoid "jurisdictional" conflicts with the NAIU formen, Miller was not given supervisory authority on the United Grocers' job. The main purpose of assigning Miller to the United Grocers' job was to "keep a paycheck coming in" when work was not possible on the Mervyn's job. Miller was assigned to the United Grocers' job by Ted Choate, vice president and estimator, when there was not enough work or because weather conditions did not permit work on the Mervyn's job.

At the Mervyn's jobsite, Miller had total responsibility for the job: ordering material, hiring and laying off employees, teaching employees, disciplining employees, and laying out or assigning work. Miller reported to Ted Choate, the estimator for the Mervyn's job. When Miller needed more employees he would call Choate, who would send employees from other Nutter Electric jobsites. If Miller did not have enough work for his crew, he would call Choate who would find work for the employees at other Nutter Electric jobsites or direct that the employees be laid off. Miller would decide which employees were to be retained and which employees were to be transferred or laid off. Choate visited the Mervyn's jobsite only three or four times within the 4–5 month constuction period. Miller had the authority to grant employees time off and to recommend employees for raises. Miller's recommedations for raises were followed. Further, Miller appointed foremen to work under him. Miller had the authority to disipline employees and on one occasion discharged an employee. The discharged employee sought to appeal his discharge to Norman Nutter but Nutter referred the employee back to Miller. The employee then brought his NAIU business representative to speak with Miller in an attempt to obtain a reversal of the discharge decision. However, Miller decided not to take the employee back.

Based on the foregoing factors, I find that Miller was a supervisor for Nutter Electric within the meaning of Section 2(11) of the Act. I further find that Miller was a representative of Nutter Electric for the purpose of collective bargaining or for the adjustment of grievances within the meaning of Section 8(b)(1)(B) of the Act. *Painters District Council No. 36 (Brown & Co.)*, 259 NLRB 808, 810 (1981); *Hour Publishing Co.*, supra. However, in the construction industry, individuals may be employed as supervisors on one job and as rank-and-file workers on the next.[6] Although Miller was paid as a foreman on the United Grocers' job, the evidence establishes that on that job he worked as a rank-and-file electrician and not as a foreman. Thus, my conclusions that Miller was a supervisor and an employer representative for Nutter Electric do not extend to Miller's status on the United Grocers' job.

2. The union discipline

Miller has been a member of Respondent for approximately 32 years. On March 2, 1982, J. Cox, a member of Respondent, filed charges against Miller for working for Nutter Electric at the United Grocers' job. Carl Monroy, a member of Respondent and a witness at the trial board hearing on the charges against Miller, testified that he observed Miller working as an electrician on the United Grocers' job. Monroy testified that Miller was not a foreman on that job but rather took his orders from the foremen. Robert Ennis, a member of Respondent, similarly testified that he observed Miller working on the United Grocers' jobsite as an electrician and not as a foreman. Ennis also testified against Miller at the Union's trial board hearing. Nutter Electric's records confirm that Miller was working on the United Grocers' jobsite on the date alleged in the charge against Miller. On May 4, 1982, Miller was notified that he was found guilty of "performing bargaining unit work while employed by Nutter Electric" and fined a total of $7,683.20. Miller did not pay the fine and on March 9, 1983, the Union brought suit in the Municipal Court of the State of California to collect the fine. The record does not reveal the present status of the lawsuit.

D. *Ted Choate, Vice President and Estimator for Nutter Electric*

Ted Choate did not testify at the instant hearing. The parties stipulated that Ted Choate is a supervisor of Nutter Electric within the meaning of Section 2(11) of the Act. Further the record shows that Miller, a supervisor and representative of Nutter Electric for purposes of collective bargaining or the adjustment of grievances, reported to Choate. Accordingly, as Choate is higher in the managerial hierarchy of Nutter Electric than Miller, it follows that Choate is also a natural and potential representative of Nutter Electric for the purposes of collective bargaining or the adjustment of grievance within the meaning of Section 8(b)(1)(B) of the Act.

On November 1, 1982, Lee Frith, Respondent's business manager, filed charges against Choate for "working for an employer who is no longer signatory to an IBEW agreement with Local Union 340." On November 16, 1982, Choate was notified that the Union's trial board had found him guilty of the charges and fined him a total of $6000.

[6] See, e.g., *Plumbers Local 137 (Hames Constr.)*, 207 NLRB 359 (1973); *Plumbers Local 725 (Powers Regulator Co.)*, 225 NLRB 138, 145 (1976); *Nassau & Suffolk Contractors' Assn.*, 118 NLRB 174, 180–181 (1975).

E. *The Bargaining Relationship*[7]

As mentioned earlier, the Union had a longstanding collective-bargaining relationship with NECA. Both Royal Electric and Nutter Electric were party to the NECA-Union negotations of 1981. The 1978–1981 agreement expired on May 31, 1981. On June 10, the Union commenced a strike against NECA and its employer-members, including Nutter Electric and Royal Electric.

The strike was still in progress on September 15 when the Union sent its disclaimer letter. On September 16, NECA sent a telegram accepting the disclaimer. On September 25, the Union filed 17 representation petitions seeking to represent the employees of 17 NECA employer-members, not including Royal Electric and Nutter Electric. On October 1, NECA signed a collective-bargaining agreement with the NAIU. Seven of the employers involved in the representation cases, reached agreement with the Union permitting their emmployees to return to work about October 1. Thereafter, these seven employers signed separate collective-bargaining agreements with the Union in February 1982. Neither employer involved herein reached agreement with the Union. Rather, Nutter Electric and Royal Electric have both adopted the NECA-NAIU collective-bargaining agreement.

Between the Union's disclaimer of September 15 and NECA's execution of a collective-bargaining agreement with the NAIU on October 1, the IBEW, the Union's parent organization, attempted to bring NECA and the Union back together again. On September 24, the Union's attorney wrote the IBEW's vice president, for the geographic area which includes Sacramento, concerning the disclaimer. The attorney's letter contains,[8] inter alia, the following passage which sheds light on the Union's disclaimer:

> In late August and early September, Business Manager Frith asked me for advice concerning the legality of and procedures for disclaiming interest in the multi-employer bargaining unit represented by NECA. He asked me what impact a disclaimer would have on the NECA members and whether a disclaimer would free those NECA members who Frith felt wanted to bargain in good faith with Local 340. I understood then and now understand that the NECA negotiation committee and Board of Directors was and is dominated by employers who want to go non-union. Those NECA members who really wanted a fair contract and wanted to bargain in good faith had been kept out of the Negotiations and ignorant of the progress of negotiations. However, these same employers had signed a Power of Attorney with NECA to represent them and up to this point had not chosen to attempt to break away from the multi-employer unit and request individual bargaining.
>
> Brother Frith also inquired whether NECA could foster an RD election petition or file an RM election petition in an attempt to oust Local 340 from its position as bargaining representative. As you know, those NECA contractors who had shown their true colors at the bargaining table hired scab replacements during the strike. In fact, NECA had already placed the newspaper ad for strike replacements *before* the strike was called and *before* impasse had been reached in negotiations.
>
> I advised Brother Frith that a disclaimer of interest was legally possible, but would have to extend to the whole multi-employer bargaining unit. I advised him that a disclaimer would cause a halt to his strike and prohibit him from demanding further bargaining with NECA on a multi-employer basis.
>
> Therefore, with this history of bad faith bargaining, lawsuits and NLRB charges, Brother Frith presented the matter of a disclaimer to the membership for its consideration. Although I was not asked to express an opinion as to the wisdom of disclaiming interest, it is my opinion that it was a realistic move to make considering the tactics employed by NECA and the possibility that the disclaimer would prompt the good contractors into action.
>
> I further advised Brother Frith that the disclaimer would permit the individual employers to grant recognition to Local 340 on an individual basis and to bargain on a single employer basis.
>
> However, I explained that the disclaimer would not have the effect of voiding the Power of Attorney. Should any employer wish to bargain individually with Local 340, it would still have to use NECA as its bargaining agent. Whether NECA would refuse to act on behalf of any employer on this basis (and whether the employer itself would seize this refusal as an opportunity to break the Power of Attorney) were matters for speculation.

In the instant hearing Frith, called as an adverse witness by counsel for Nutter Electric and Royal Electric, testified that after the disclaimer it was his intention to organize every electrical contractor that was willing to sign an agreement with the Union. Frith further testified that it was the Union's first concern to organize the 17 employers for which petitions were filed and get an agreement and an association established before any plans were made to organize the other employers. According to Frith, after a new association was formed with the 17 employers, any other employer that was willing to become a part of the new organization would be welcome. Frith testified "ultimately down the road it was our hope that everybody would be back under an agreement." By means of leading questions, Respondent's counsel was able to secure an explanation from Frith that all Frith meant was that the Union could not turn down Royal Electric, Nutter Electric, or any other employer that requested to sign an agreement. According to Frith, aside from the general premise that the Union would sign a contract with any employer that requested an agreement, the Union had no desire to have a contract

[7] In this section of the decision, I have taken judicial notice of the prior cases before me involving Respondent and NECA. See, e.g., *Meat Packers National*, 230 NLRB 222, 227 (1977); *Airlines Parking*, 197 NLRB 762 (1972).

[8] The attorney's letter was received as an admission by a party opponent in both the *Hulse* and *Grason* cases.

with Nutter Electric. Frith gave no reason or explanation why the Union sent its disclaimer letter.

On December 29, the Regional Director administratively dismissed the Union's 17 representation petitions. On September 12, 1982, in *Arden*, supra, the Board reversed the Regional Director and ordered that a hearing be held limited to the issue of the continuing existence of viability of the NECA multiemployer bargaining unit which the Regional Director had administratively found to be a bar to the 17 petitions. The consolidated representation hearing was consolidated with the unfair labor practice case, *Grason Electric*, supra. That consolidated hearing closed on February 28, 1983, and the representation cases were transferred to the Board in Washington, D.C., on that same date and are now pending before the Board for decision. In the unfair labor practice case, the Union charged, inter alia, that the collective-bargaining agreement between NECA and NAIU violated Section 8(a)(2) of the Act. The Union charged that Nutter and seven other NECA employers violated Section 8(a)(2) by recognizing and bargaining with the NAIU. In my decision, which issued August 31, 1983, I noted that Respondent argued that NECA and Nutter had violated Section 8(a)(2) and (1) of the Act by recognizing the NAIU, a minority union, when the Union itself was the majority representative of the employees in the recognized bargaining unit.[9]

In my decision in the *Hulse* case, supra, which issued on March 28, 1983, I found that Respondent violated Section 8(b)(1)(B) of the Act by preferring charges against representatives of May Han Electric, d/b/a M & M Electric, Clint McCubbin, Inc., Rex Moore Electric Company, and Amos J. Walker, Inc., and by imposing fines against such representatives. In that case I found that the Union intended to withhold supervision from the employers in order to force the employers to come back to the Union. The Union would then be in a position to bargain with the employers on an individual basis rather than on a NECA multiemployer basis.

F. *Conclusions*

Section 8(b)(1)(B) of the Act provides that "it shall be an unfair labor practice for a labor organization . . . to restrain or coerce . . . an employer in the selection of his representative for the purposes of collective bargaining or the adjustment of grievances." The applicable principles of law are set forth in *Plumbers Local 364*, 254 NLRB 1123, 1125 (1981):[10]

Section 8(b)(1)(B) prohibits both direct union pressure—for example, strikes—to force replacement of grievance representatives and indirect union pressure—for example, union discipline of supervisor-members—which may adversely affect the chosen supervisors' performance of their representative functions. *American Broadcasting Companies v. Writers Guild of America West, Inc.*, 437 U.S. 411 (1978); *New Mexico District Council of the United Brotherhood of Carpenters and Joiners of America (A.S. Horner, Inc.)*, 177 NLRB 500, 502 (1965), enfd. 454 F.2d 1116 (10th Cir. 1972); and *Wisconsin River Valley District Council of Carpenters and Joiners of America, AFL-CIO (Skippy Enterprises, Inc.)*, 218 NLRB 1063, 1064 (1975), enfd. 532 F.2d 47 (7th Cir. 1976).

It is also well settled that union discipline of supervisor-members who cross a picket line or otherwise violate a union's no-work rule in order to perform their normal supervisory functions constitutes indirect union pressure within the prohibition of Section 8(b)(1)(B). In reaching this conclusion, the Board and courts have recognized that the reasonably foreseeable and intended effect of such discipline is that the supervisor-member will cease working for the duration of the dispute, thereby depriving the employer of the grievance adjustment services of his chosen representative. *American Broadcasting Companies*, supra, at 433–437 fn. 36; *NLRB v. International Union of Operating Engineers, Local Union No. 501, AFL-CIO*, 580 F.2d 359, 360 (9th Cir. 1978); *A. S. Horner*, supra, 502; and *Skippy Enterprises*, supra, 218 NLRB 1064, enfd. 532 F.2d at 52–53. Such discipline is unlawful even where, as here, the supervisor defies the union and continues to work for the employer during the dispute; the discipline is unlawful because the supervisor, having been disciplined for working during a labor dispute, may reasonably fear further discipline and, hence, will be deterred from working during any future disputes. The employer, in such circumstances, must either replace the disciplined supervisor or risk loss of his services during a future dispute; in either event, the employer is coerced in the selection and retention of his chosen grievance adjustment representative. *American Broadcasting Companies*, supra, 433–437.

In light of the foregoing principles, Respondent's discipline of Schoux and Choate, because they worked for nonsignatory employers, would appear to restrain and coerce the instant two employers in the selection and retention of their grievance adjustment representatives.

Respondent's discipline of Miller for working on Nutter Electric's United Grocers' jobsite presents a different situation. As discussed above, it is not uncommon in the construction industry for an individual to be employed as a rank-and-file worker on one job and as a supervisor on the next. Here, Miller, a supervisor, was fined for conduct he engaged in while working as a rank-and-file employee. The General Counsel and the

[9] The Union sought an order setting aside the entire collective-bargaining agreement between the NAIU and NECA. I found, inter alia, that NECA had unlawfully recognized the NAIU with regard to two employers for whose employees valid representation petitions were pending. I also found, inter alia, that Nutter Electric had lawfully recognized the NAIU. However, Nutter had assisted the NAIU by unlawfully soliciting dues-checkoff authorizations and by unlawfully deducting dues from the wages of some employees without proper written authorization. The unfair labor practice case was transferred to the Board upon issuance of my decision. If timely exceptions to the decision are not filed, the decision will be adopted by the Board and become its findings, conclusions, and Order.

[10] See also *Painters District Council No. 36 (Brown & Co)*, 259 NLRB 808, 810–811 (1981).

Charging Parties argue that during the time period from March 2, when Miller was charged by the Union, until May 4, when the fine was imposed, Miller worked only 29 percent of the time on the United Grocers' jobsite. However, I find this argument unpersuasive since there is no evidence that any portion of the discipline was imposed because of Miller's work on any jobsite other than the United Grocers' jobsite. As discussed above, on this jobsite Miller worked as a rank-and-file employee. The reasonable and foreseeable consequences of such discipline does not restrain or coerce Nutter Electric in its selection or retention of supervisors. Nor does this discipline interfere with Miller's performance of his representative functions. The resonable consequence of the Union's action is that Nutter Electric must employ Miller in a supervisory capacity if it intends to use Section 8(b)(1)(B) as a shield from union discipline. Section 8(b)(1)(B) does not prevent intraunion discipline of rank-and-file employees. It is well settled that a union may fine an employee-member for crossing a picket line or otherwise violating a union's no-work rule. See, e.g., *NLRB v. Textile Workers Local 29*, 409 U.S. 213, 217 (1972); *Machinists Local 405 v. NLRB*, 412 U.S. 84 (1973). Accordingly, for the reasons discussed above, I shall recommend that the complaint in Case 20-CB-5825, which pertains to the Union's discipline of Miller, be dismissed.

Respondent, relying on the decision of the United States Court of Appeals for the Ninth Circuit in the *Chewelah Contractors* case,[11] argues that no violation of Section 8(b)(1)(B) can be found because the Union did not have a collective-bargaining agreement or a collective-bargaining relationship with either of the employers at the time Schoux and Choate engaged in the conduct for which they were fined.

In *Chewelah Contractors*, the court, in refusing to enforce the Board's finding of a violation of Section 8(b)(1)(B), stated that the purposes of the section were to prevent unions from forcing employers into or out of multiemployer bargaining units and to gurarantee that an employer's bargaining representative would be completely faithful to the employer's desires. The court noted that in any decision involving Section 8(b)(1)(B) that had come to its attention, the charged union had been the bargaining representative of the complaining company's employees. However, the charged union in *Chewelah Contractors* neither represented the company's employees nor demonstrated a desire to represent the employees. The court reasoned that the union had no incentive to influence the company's choice of representative or affect the member's loyalty to the company. Thus, the court held that a union does not violate Section 8(b)(1)(B) by disciplining a member, even though that member is also the bargaining representative of an employer if the union neither represents nor shows an intent to represent the employer's employees.

In *Plumbers, Local 364*, supra at 1126-27, the Board concluded that the Ninth Circuit's decision in *Chewelah* was in conflict with a long line of Board cases, and that the Board's position appeared to have the support of the United States Supreme Court and the opinions of other circuit courts:

> . . . in *American Broadcasting Companies, Inc. v. Writers Guild of America, West, Inc.*, supra, the Supreme Court affirmed the Board's finding that the union (which represented writers in the film industry) violated Section 8(b)(1)(B) by threatening to discipline and by disciplining various supervisors—including directors—who worked during the writers' strike. It was undisputed that the directors—who supervised other employees and adjusted other employees' grievances—never dealt with writers and did not adjust Writers' grievances. In the Supreme Court, the union argued that the threats and discipline directed toward the directors could not possibly affect their adjustment of writers' grievances and that therefore the union's actions regarding the directors had not violated Section 8(b)(1)(B). 437 U.S. at 437, fn. 37. The Supreme Court explicitly rejected the union's contention, noting that "directors . . . had [grievance] adjustment duties with respect to other employees" and finding that the union's sanctions made the directors "less than completely reliable and effective employer representatives for the duration of the strike, and less likely to perform any supervisory task during future strikes." *Id.* The court then concluded: "A union may no more interfere with the employer's choice of a grievance representative with respect to employees represented by other unions than with respect to those employees whom it itself represents." 437 U.S. at 438, fn. 37.
>
> The Union involved in *Writers Guild* did, of course, represent the employer's writing employees and, thus, had a bargaining relationship with the coerced employers. However, the Supreme Court also made clear that its rationale applied equally in circumstances where the union did not represent the employees of the coerced employer. Thus, the Supreme Court endorsed the Board's decision in *A. S. Horner, Inc.*,[7] finding an 8(b)(1)(B) violation where the respondent union did not represent the employees of the coerced employer. Referring with approval to a D.C. Circuit opinion[8] discussing *Horner*, the Supreme Court stated (437 U.S. at 436 fn. 36):
>
> > The [D.C. Circuit] noted its agreement with [Horner] where a union member worked as a supervisor for a company which had no contract with the union . . . . A fine imposed in these circumstances violated [Section 8(b)(1)(B)] because compliance by the supervisor with the union's demands would have required his leaving his job and thus have the effect of depriving the Company of the services of its selected representative for the purposes of collective bargaining or the adjustment of grievance . . . . The [D.C. Circuit] said that *Horner* thus "falls close to the original rationale of 8(b)(1)(B) which was to permit the

[11] *NLRB v. Electrical Workers IBEW Local 73* (Chewelah Contractors), 621 F.2d 1035 (9th Cir. 1980), denying enf. 231 NLRB 809 (1977).

employer to keep the bargaining representative of his own choosing." 159 U.S. App. D.C., at 284, fn. 19, 487 F.2d at 1155, fn. 19.

Furthermore, in addition to the Supreme Court's decision in *Writers Guild* and the Tenth Circuit's decision enforcing the Board's order in *A. S. Horner*, at least two other courts of appeals have approved Board findings of 8(b)(1)(B) violations where the respondent union had no bargaining relationship with the employer involved. See *International Organization of Masters, Mates and Pilots International Marine Division, ILA, AFL-CIO*; and *Union De Trabajordores De Muelles Y Ramas Anexas, Local 140 [Marine & Marketing International Corp.] v. NLRB*, 486 F.2d 1271, 1274 (D.C. Cir. 1973), cert. denied 416 U.S. 956 (1974); *International Organization of Masters, Mates and Pilots Marine Division, International Longshoremen's Association, AFL-CIO v. NLRB*, 539 F.2d 554, 559-560 (5th Cir. 1976), cert. denied 434 U.S. 828 (1977). Both the D.C. Circuit and the Fifth Circuit decisions were cited with approval by the Supreme Court in *Writers Guild*, 437 U.S. at 438, fn. 37.

[7] *New Mexico District Council of Carpenters (A. S. Horner, Inc.)*, 177 NLRB 500 (1969), enfd. 454 F.2d 1116, 1118 (10th Cir. 1972).

[8] *International Brotherhood of Electrical Workers, Local 134, International Brotherhood of Electrical Workers, AFL-CIO [Florida Power & Light Co.] v. N.L.R.B.*, 487 F.2d 1143, 1155, fn. 19 (1973), affd. 417 U.S. 790 (1974).

Even assuming that the rationale of *Chewelah* should be applied to the present case, a violation of the Act would still be found. In *Chewelah* the court found that since the union did not represent Chewelah's employees nor demonstrate a desire to represent the employees, the union had no incentive to either influence Chewelah's choice of bargaining representative or affect the supervisors' loyalty to Chewelah. In this case the Union evidenced reasons to influence the employers' choice of bargaining representatives and to affect the supervisors' loyalty to their employers.

While the Union disclaimed interest in representing employees in the NECA bargaining unit, it sought representation in single employer units of 17 NECA represented employers. Lee Frith's testimony at this proceeding reveals that Respondent intended to bargain with a new association comprised of these 17 employers. Thereafter, Respondent desired to have the other employers join the new association.

In the *Hulse* case, supra, I found that the Union intended to withhold supervision from the employers in order to force the employers to come back to the Union. The Union would then be in a position to bargain with the employers on an individual basis rather than on a NECA multiemployer basis. Here, Frith indicated that the Union sought to bargain with a new association and have the other employers join or adopt the new association's agreement. Thus, *Chewelah* is distinguishable because the Union continued to desire to represent the employees of the employers albeit not in the NECA multiemployer unit. More importantly, one of the Union's purposes was to force the employers out of the NECA multiemployer bargaining and into bargaining on a single employer basis or new association basis. A union's attempt to force an employer to resign from a multiemployer bargaining association was recognized as an 8(b)(1)(B) violation by the Court in *Chewelah*. See 621 F.2d at 1036, citing *Roofers Local 36 (Roofing Contractors)*, 172 NLRB 2248 (1968). Thus, even under the rationale of *Chewelah*, Respondent's fining of the supervisors as part of a course of conduct designed to cause the "good" employer-members of NECA to abandon NECA multiemployer bargaining and to bargain on a single employer basis or to form a new association, is a violation of Section 8(b)(1)(B) of the Act.

CONCLUSIONS OF LAW

1. Respondent is a labor organization within the meaning of Section 2(5) and Section 8(b) of the Act.

2. Royal Electric and Nutter Electric are employers engaged in commerce and in businesses affecting commerce within the meaning of Section 2(6) and (7) of the Act.

3. Albert Schoux (Royal Electric) and Ted Choate (Nutter Electric), at all times material, were supervisors for their respective employers within the meaning of Section 2(11) of the Act and employer representatives within the meaing of Section 8(b)(1)(B) of the Act.

4. By preferring charges against Schoux and Choate, and imposing fines against them, Respondent restrained and coerced the above-named Employers in the selection and retention of their representatives for the purposes of collective bargaining and the adjustment of grievances, and thereby has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(b)(1)(B) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

6. The General Counsel has not established that Respondent has violated the Act in imposing discipline against Melvin Miller for working on Nutter Electric's United Grocers jobsite.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices, I shall recommend that Respondent be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[12]

[12] All outstanding motions inconsistent with this recommended Order are hereby denied. If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

Respondent, International Brotherhood of Electrical Workers, Local Union 340, AFL-CIO, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Restraining or coercing Royal Electric and Nutter Electric in the selection of their representatives for purposes of collective bargaining or the adjustment of grievances by preferring charges, holding a trial, fining, or otherwise disciplining any such representative performing supervisory, managerial or grievance-adjustment functions for said Employers.

(b) In any like or related manner restraining or coercing Royal Electric and Nutter Electric in the selection of their representatives for the purposes of collective bargaining or the adjustment of grievances.

2. Take the following affirmative action designed to effectuate the purposes of the Act.

(a) Rescind and expunge from its records all disciplinary action taken against Albert Schoux (Royal Electric) and Ted Choate (Nutter Electric), including the fines, because of their working as supervisors and employer representatives, and notify Schoux and Choate, in writing, that the fines levied against them have been rescinded and that all records of disciplinary action against them have been expunged.

(b) Post at its business office and meeting halls copies of the attached notice marked "Appendix."[13] Copies of said notice, on forms provided by the Regional Director for Region 20, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including places where notices to members are customarily posted. Reasonable steps shall be taken by Repsondent to ensure that said notices are not altered, defaced, or covered by any other material.

(c) Mail to the Regional Director for Region 20 signed copies of said notice for posting by the Employers, if those companies are willing, in places where notices to employees are customarily posted.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply.

IT IS FURTHER ORDERED that the allegations of the complaint in Case 20-CB-5825 are hereby dismissed.

[13] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT restrain or coerce Nutter Electric or Royal Electric in the selection of their representatives for purposes of collective bargaining or the adjustment of grievances by preferring charges, holding a trial, fining, or otherwise disciplining any such representative performing supervisory, managerial or grievance-adjustment functions for said Employers.

WE WILL NOT in any like or related manner restrain or coerce Nutter Electric or Royal Electric in the selection of their representatives for the purpose of collective bargaining or the adjustment of grievances.

WE WILL rescind and expunge from our records all disciplinary action taken against Albert Schoux (Royal Electric) and Ted Choate (Nutter Electric), including the fines, because of their working as supervisors and employer representatives, and notify Schoux and Choate, in writing, that the fines levied against them have been rescinded and that all records of disciplinary action against them have been expunged.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 340, AFL-CIO